No. 311

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Supreme Court of the United States

OCTOBER TERM, 1944.

CHARLES D. OFFHOUSE, *et als.*,
Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF PATERSON IN THE COUNTY OF PASSAIC, a corporation,
Appellee,

On Appeal from the New Jersey Supreme Court.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

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This brief is filed pursuant to Rules 7 and 12, in opposition to the appellee's motion to dismiss this appeal or to affirm the judgment of the New Jersey Supreme Court. The appeal in this case was allowed by the Chief Justice of the New Jersey Supreme Court by order dated July 3, 1944.

The appellants are employed as teachers in the public schools of the City of Paterson. The appellee, the Board of Education of the City of Paterson, a municipal corporation, is their employer. The appellee, in October, 1921, adopted rules and regulations governing the employment of its teacher employees, their salaries, and the mode and time of payment thereof, as authorized by the statutes of New Jersey.* By resolution adopted October 14, 1937, the

* The pertinent statutes are set out in full in the appendix to the Appellants' Statement of Jurisdiction.

appellee repealed those rules and regulations, and has since failed to pay the appellants at the rates provided therein. The question involved in this appeal, is whether the repeal by the appellee of its rules and regulations impaired the obligation of a contract between the appellee and the appellants, engaged by the appellee under those rules and regulations, contrary to Article I, Section 10 of the Constitution of the United States.

The facts have been fully set out in the Appellants' Statement of Jurisdiction filed herein pursuant to Rule 12. Since those facts have not been challenged or controverted in any way in the appellee's motion to dismiss, they will not be elaborated upon or repeated here.

The appellee's motion to dismiss or affirm is based upon four grounds. In opposition to each of those four grounds, the appellants will here establish the following propositions:

I. The Federal question was properly raised in the state courts.

II. The judgment of the New Jersey Supreme Court was based solely upon a Federal ground.

III. The Federal question involved in this appeal is substantial.

IV. The judgment appealed from was rendered by the highest court of New Jersey in which a decision in the suit could be had.

ARGUMENT.

POINT I.

The Federal question was properly raised in the state courts.

Inspection of the opinion of the New Jersey Supreme Court,* discloses that the New Jersey Supreme Court considered and passed upon the appellants' contention that the appellee's repeal of its rules and regulations constituted an impairment of contract contrary to Article I, Section 10 of the Constitution of the United States. Under such circumstances, this Court will not inquire whether, under state practice, the question might have been raised at any earlier point in the proceedings.

Sully v. *American National Bank,* 178 U. S. 289;
Chicago, Rock Island & Pacific Railway Co. v. *Perry,* 259 U. S. 548;
Home Insurance Co. v. *Dick,* 281 U. S. 397;
Whitfield v. *Ohio,* 297 U. S. 431.

Incidentally, the New Jersey Supreme Court was the first tribunal in which the power to pass upon the Federal question admittedly resides. This aspect of the jurisdictional requirements has been discussed in the Appellants' Statement of Jurisdiction under Part IV.

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* The opinion appears in the appendix to the Appellants' Statement of Jurisdiction.

POINT II.

The judgment of the New Jersey Supreme Court was based solely upon a Federal ground.

The rule for judgment entered in the New Jersey Supreme Court does not disclose the grounds upon which it is based. To determine those grounds, recourse must be had to the opinion of that court. In inquiring whether a judgment is based upon Federal grounds, the conclusions of the trial court are not considered; only the final action of the highest court of the state before which the case could be brought, as evidenced in its opinion, is material to the inquiry.

> *Allen* v. *Southern Pacific Railroad Company*, 173 U. S. 479.

An analysis, paragraph by paragraph, of the opinion of the New Jersey Supreme Court in support of the judgment below, shows conclusively that the determination of the Federal question was essential to the judgment entered, and that, without determination of the Federal question, there could have been no final disposition of the case.

The first paragraph of the opinion below contains a brief history of the litigation. The second paragraph recites some of the pertinent facts, and the third paragraph reviews the determinations of the Commissioner of Education and the State Board of Education, the statutory tribunals initially vested with jurisdiction to try the dispute.

Paragraph 4 discusses the contentions made by the appellants here (petitioners below). The fifth paragraph

defines "base salary" and continues with a narration of further facts.

In paragraph 6 appears the first point decided by the New Jersey Supreme Court; namely, that the rules and regulations were repealed by the appellee. It had been argued on behalf of the appellants that there had been no effective repealer of the rules and regulations adopted by the appellee, and paragraphs 6 and 7 of the opinion below constitute the New Jersey Supreme Court's answer to that contention. No issue is raised in this Court on this aspect of the decision below, since the question whether the appellee enacted a repealer is purely one of state law. It was necessary for the state court to find that a repealer had been enacted, before it could determine that the repealer was effective.

In paragraph 8, the New Jersey Supreme Court finds that "Salary regulations by district boards of education are repealable." That is the precise question involved in this appeal. The pronouncement of the New Jersey Supreme Court does not furnish an independent non-Federal ground for its decision, because that pronouncement is inextricably bound up with a consideration of the contractual nature of salary regulations. This Court is not bound by the state court's determination, even though a question of local law is involved. The very same argument against jurisdiction made by the appellee here, was made by the respondent in *Indiana ex rel Anderson* v. *Brand*, 303 U. S. 95, where this Court said, at page 100,

> "* * * The Supreme Court has decided, however, that it is the state's policy not to bind school corporations by contract for more than one year.

> On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation. This involves an appraisal of the statutes of the State and the decisions of its courts."

The concluding paragraphs of the opinion deal with the Federal question raised by the appellants. The New Jersey Supreme Court makes the flat assertion that there is no contractual relationship in New Jersey between tenure teachers and boards of education which have hired those teachers pursuant to rules and regulations, and that, as a result, there is no violation of Article I, Section 10 of the Constitution of the United States when the rules and regulations are repealed.

This analysis of the opinion of the court below demonstrates the complete absence of any non-Federal ground for decision. As a matter of fact, the appellee, in its statement opposing jurisdiction, points to no independent non-Federal ground for the decision of the New Jersey Supreme Court, as evidenced in that court's opinion. The appellee's discussion deals solely with the determinations of the Commissioner of Education and of the State Board of Education, upon neither of which the New Jersey Supreme Court based its decision.

The appellee asserts the existence of non-Federal grounds for the decision of the court below. They are:

(a) Even if a contract was involved, the provisions of the state statute, which permitted change, amendment or repeal of rules and regulations, was incorporated in the contract, and became an integral part thereof.

The short answer to this contention is that the existence of the contract and the nature and extent of its obligation became Federal questions for the purpose of determining whether there has been a violation of the provisions of Article I, Section 10 of the United States Constitution, and, for this purpose, finality is not, and cannot be accorded to the views of a state court.

Indiana ex rel Anderson v. *Brand, supra;*
Irving Trust Co. v. *Day,* 314 U. S. 556.

The New Jersey courts have, furthermore, held that the power to amend rules and regulations may not be exercised to the disadvantage of tenure teachers, in which class all the appellants belong*. *Gowdy* v. *State Board of Education,* 84 N. J. L. 231; affirmed, 85 N. J. L. 726; *Weber* v. *Trenton Board of Education,* 125 N. J. L. 611; affirmed, 127 N. J. L. 279.

(b) That, according to the rules and regulations adopted by the appellee, no increase provided for in the rules and regulations was payable, until a particular recommendation was made by the appellee's agents for an increase; that no such recommendations were made after 1933; and that, as a result, the appellants are barred from recovery. The New Jersey Supreme Court made no such finding; its judgment was not based in whole or even in part on such a proposition. The argument here advanced by the appellee to oppose jurisdiction in this Court, is based

* See discussion *post,* pages 10, 11, 12, and 13.

entirely upon the conclusion of the Commissioner of Education and the State Board of Education. In the argument presented before the statutory tribunals, the appellants urged that, under the numerous New Jersey cases cited by them, the appellee could not defeat the right of the appellants to increases in salary by the simple expedient of instructing its agent not to recommend such increases. In answer to this contention, the State Board of Education said (Record, p. 84):

> "The cases cited by appellants on this point relate to the interpretation of contracts. The rules and regulations of respondent are not contracts."

It is obvious, therefore, that, even if it is competent to examine the opinions of the statutory tribunals, they in turn are based upon the non-existence of a contract, a determination which this Court will make for itself, notwithstanding the finding of the state courts.

Indiana ex rel Anderson v. *Brand, supra;*
Irving Trust Co. v. *Day, supra.*

POINT III.

The Federal question involved in this appeal is substantial.

The appellee asserts that the Federal question raised is without substance, because it has been "so explicity foreclosed by prior decisions as to afford no basis for a writ of error." There is nowhere any decision on the precise point raised by this appeal, except in the opinion of the court below supporting the judgment which is the subject of this appeal. There is no adjudication, elsewhere

than in this case, that the repeal by a local board of education of rules and regulations adopted by it, pursuant to which teachers were hired, did not involve an impairment of contract contrary to the provisions of Article I, Section 10 of the Constitution of the United States. *Phelps* v. *Board of Education,* 300 U. S. 319, decided only that the New Jersey tenure law (see part VI of the Statement of Jurisdiction) did not, in and of itself, confer a contractual status upon New Jersey teachers. In that case, this Court said (300 U. S. at p. 323):

> "* * * we find nothing in the record to indicate that the board was bound by contract with the teacher for more than the current year."

There were no rules and regulations in evidence in the *Phelps* case.

The sole statute before this Court for construction in the *Phelps* case was the tenure law, P. L. 1909, Ch. 243*. The effect of Section 106 of Chapter 1, P. L. 1903, Second Special Session,* authorizing adoption of rules and regulations in lieu of written contracts, was not in issue there. The question involved here is whether a contract arose between the appellants and the appellee when the appellee adopted its rules and regulations; a far different question than that involved in the determination whether the tenure law, standing alone, created a contract, the situation treated in the *Phelps* case.

The Federal question here raised, was not raised, argued, or decided in *Greenway* v. *Camden Board of Education,* 129

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* The statute is set out in full in the appendix to the Appellants' Statement of Jurisdiction.

N. J. L. 46, or in *Liva* v. *Board of Education*, 126 N. J. L. 221, or in *Redcay* v. *State Board of Education*, 130 N. J. L. 369; affirmed 131 N. J. L. 326. There is a complete lack of precedent. There is, therefore, no ground for the contention that the appeal is foreclosed by prior adjudicated cases.

Examination of precedents in New Jersey will throw light on the basis of the appellants' claim of contract. *Gowdy* v. *State Board of Education, supra*, was decided by the New Jersey Supreme Court in 1913. It was affirmed, without opinion, by the Court of Errors and Appeals in 1914. In that case, the prosecutrix was employed as a teacher by the Paterson Board of Education, which had adopted rules and regulations providing for the payment of annual salaries in 10 monthly installments. The Paterson Board enacted a resolution providing for the payment of salaries in 12 equal installments. The New Jersey Supreme Court said, in interpreting the same statutes involved in this appeal (84 N. J. L. at pp. 232 and 233):

> "The prosecutrix had served three consecutive years as such school teacher, and therefore, under section 106 a (Comp. Stat., p. 4763), she holds her employment during good behavior and efficiency and is not subject to a reduction of salary except for causes specified in said section, and they are not pertinent to the inquiry here. Section 106 of the Public School act (Comp. Stat., p. 4762), *inter alia*, provides: 'Board of education may make rules and regulations governing the engagement and employment of teachers and principals, the terms and tenure of such employment and the promotion and dismissal of such teachers and principals, the salaries, time and mode of payment thereof, and may from time

to time change, amend or repeal such rules and regulations. The employment of any teacher by such board and the rights and duties of such teacher with respect to such employment shall be dependent upon and shall be governed by the rules and regulations in force with reference thereto.'

"It is insisted by the defendants that by virtue of this provision the board of education of the city of Paterson had a right to change, amend or repeal such rules and regulations in force, and therefore the resolution to change from the ten-payment plan to the twelve-payment plan was an authorized act. If the effect of this change reduced the salary of the prosecutrix (and we think it does) the resolution is ineffectual as to her, she being within the protection of section 106a, which clearly forbids the reduction of the salary of a teacher who has completed three consecutive years of service. Furthermore, this act is a later act than the section which gives the department the right to change its rules and regulations, and the two acts must be read together. • • • We think that such a result is in effect an impairment of the contract and in clear violation of section 106a."

In 1941, the New Jersey Supreme Court in *Board of Education* v. *State Board of Education*, 125 N. J. L. 611, 614, said, in discussing the effect of the *Gowdy* case, *supra:*

"Subsequent disadvantageous changes in the schedule cannot affect those who have acquired tenure. *Gowdy* v. *State Board of Education*, 84 *Id.* 231; *affirmed*, 85 *Id.* 726."

In *Weber* v. *Board of Education, supra*, decided by the New Jersey Court of Errors and Appeals in 1941, it was said, in holding invalid a resolution of the Trenton Board

of Education providing for the payment of salaries in amounts different from those provided by rules and regulations (127 N. J. L. at pages 284, 285, and 286):

> "Moreover, the power to make rules and regulations with respect to teachers and their employment does not carry with it the right to abrogate definite salary contracts.
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> "The case of *Gowdy* v. *State Board of Education*, 84 N. J. L. 231, is discussed. That case holds that if the effect of an act is to reduce the teachers' salary, it violates the statute. Appellant seeks to maintain that the correct interpretation and objective of the statute is to preserve basic salaries and to bar infringement upon them, but that the true interpretation does not extend to insurance against changes relative to increases merely because those changes might be disadvantageous to the teachers. • • • In saying that the *Gowdy* opinion is against decrease of basic salary, but not a bar to elision of increases, appellant again follows a form of begging the question, for as stated above, the crucial point is whether or not the annual increments are inherently part of the so-called basic salary.
>
> "Support for the right to abolish a salary schedule is invoked by appellant in the case of *Liva* v. *Board of Education, Lyndhurst Township*, 126 N. J. L. 221. That right is not disputed by respondents so long as it is not made to extend to teachers who acquired tenure, and appellant admitted the propriety of this exception. The *Liva* case is not on fours with the present facts. It proceeded on the supposition that there was no salary schedule in effect, and that hence the local board in that case did not undertake to grant automatic increments. In the

case now under review we have a salary schedule that must be taken into account."

• • • • • •

"The annual increments were integral parts of the salaries, effective when the designated year of service had been attained, that having been the contract with the teachers. It is a statutory requirement that there be a salary schedule, or in its absence, a specific contract with the teacher. The annual increment in a salary schedule is not a prospective increase, subject each time to control of the local authorities before it becomes absolute. It is intrinsically part of the salary, vesting contractually and becoming operative in the various stages of time spaced by the schedule. To hold otherwise would negative the schedule, convert it into a meaningless and futile gesture and be incongruous with the provisions in the local regulations. The resolution in question, though called an equalization measure, had for its effect the curtailment of the salaries of the respondent teachers for the indicated years. The salary schedule was not subject to change or amendment by the local Board, so that its resolution attempting such a result was void."

POINT IV.

The judgment appealed from was rendered by the highest court of New Jersey in which a decision in the suit could be had.

The local practice followed in this case is explained in Part IV of the Appellants' Statement of Jurisdiction. There is no substance whatsoever in the appellee's claim that an appeal will lie to the New Jersey Court of Errors

and Appeals. The cases cited by the appellee have nothing whatsoever to do with the right of appeal from the refusal of the New Jersey Supreme Court to grant a writ of certiorari. The writ in New Jersey is a prerogative writ lodged in the absolute discretion of the New Jersey Supreme Court, whose determination on whether a writ should be allowed is not subject to review by the New Jersey Court of Errors and Appeals.

Johnson v. *Board of Embalmers*, 107 N. J. L. 380;
Daniel B. Frazier Co. v. *Long Beach*, 110 N. J. L. 221;
Post v. *Anderson*, 111 N. J. L. 303;
Ford Motor Co. v. *Fernandez*, 114 N. J. L. 202;
Pennsylvania R. R. Co. v. *Board of Public Utility Commissioners*, 116 N. J. L. 527;
Wedgest v. *Globe Porcelain Co.*, 125 N. J. L. 438;
Staubach v. *Cities Service Oil Co.*, 130 N. J. L. 157.

It is hardly conceivable that the Chief Justice of the New Jersey Supreme Court, a member of the New Jersey Court of Errors and Appeals, would have signed the order allowing the appeal to this Court, if an appeal would lie to the New Jersey Court of Errors and Appeals.

For the reasons herein and in the Appellants' Statement of Jurisdiction set forth, it is respectfully submitted that the appellee's motion should be denied.

Respectfully submitted,

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